

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of WOYTASZEK, Minors.

UNPUBLISHED

March 18, 2014

No. 317526

Alpena Circuit Court

Family Division

LC No. 12-006817-NA

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Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Respondent-father, L. Woytaszek, appeals as of right the trial court's order terminating his parental rights to his three minor children under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (children likely to be harmed if returned to the parent). We affirm.

**I. FACTS**

**A. BACKGROUND FACTS**

In July 2012, the Department of Human Services (the Department) petitioned the trial court for custody of the children on the basis of abuse and neglect by the children's mother, A. Lockwood. The petition also alleged that Woytaszek had a criminal history, had argued with Lockwood in front of the children, and had fled from the police during a visit to Lockwood's home. In October 2012, Lockwood pleaded that the allegations in the petition were true. She subsequently released her parental rights to the children on March 21, 2013.

**B. TERMINATION PROCEEDINGS**

On May 6, 2013, the Department filed a supplemental petition that sought to terminate Woytaszek's parental rights. The Department alleged that termination was appropriate on the basis of Woytaszek's criminal history and history of substance abuse.

At the termination trial, Michelle Marzean, the children's foster care worker, testified that Woytaszek had signed two service plans to address substance abuse and mental health concerns. Marzean testified that Woytaszek did not complete counseling and only completed one drug screen. Marzean testified that Woytaszek fled from random drug screens on several occasions.

Kimberly Schultz, a staff attorney for Alpena County Friend of the Court, testified that Woytaszek was \$60,000 in arrears for child support for his other children. Cheryl Geyer, Woytaszek's parole officer, testified that Woytaszek frequently failed to report in, and did not report address changes, verify his employment, or perform court-ordered community service.

Robert Smock, Woytaszek's substance abuse counselor, testified that he scheduled six counseling sessions with Woytaszek, but Woytaszek attended only two of the sessions. Woytaszek testified that he stopped attending counseling because he was not comfortable with Smock and did not agree with his methods.

Geyer testified that Woytaszek had attended a residential treatment facility, but that he had checked out of the facility without informing her of his release. Marzean testified that she referred Woytaszek to Sunrise Center for inpatient substance abuse treatment, but he checked himself out before completing the program. Tommy Standen, a therapist at Sunrise Center, testified that Woytaszek had participated in therapy, but checked himself out early against staff advice.

Scott Gagnon, an employee of the Alpena County Sheriff's Department, testified that Woytaszek was incarcerated at the time of trial. Gagnon testified that Woytaszek was incarcerated 25 times between 1995 and 2013. Marzean testified that, in terms of his children's lives, Woytaszek was incarcerated for 26 percent of the oldest child's life, 34 percent of the middle child's life, and 47 percent of the youngest child's life. Marzean testified that the children had spent at least one-fifth of their lives in foster care.

Woytaszek testified that he was currently incarcerated, but expected to be released on July 8, 2013. Woytaszek testified that he planned to become sober, live with his parents, and avoid troublesome friends. Marzean testified that Woytaszek was supposed to live with his mother on two previous occasions, but failed to do so. Woytaszek's mother testified that she had a good relationship with Woytaszek's children and would help Woytaszek with his children until he had established himself. Marzean testified that the Department had investigated Woytaszek's mother as a possible relative placement, but was unable to place the children with Woytaszek's mother because she reported that she was not in a situation in which she could take the children.

Woytaszek testified that he loved his children. Pamela Tippman testified that she worked with Woytaszek concerning his parenting skills. Tippman testified that the children loved Woytaszek, and that he benefitted from her services. Marzean testified that Woytaszek was always good with the children and was appropriate during parenting time visits. However, Marzean testified that Woytaszek attended only 47 percent of his scheduled parenting times, and that the children became upset and unstable when Woytaszek missed his visits.

### C. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS

At the conclusion of the bench trial, the trial court found that Woytaszek failed to comply with his treatment plan and had not made progress toward securing housing or employment. It found that Woytaszek had failed to comply with drug testing, counseling, or parenting classes. It found that Woytaszek was frequently incarcerated, and that placing the children with a relative was not possible because Woytaszek's mother was unable to take the children. It found that

Woytaszek's ongoing inability to care for the children put them at a risk of harm, particularly psychological harm. It concluded that the Department had proved MCL 712A.19b(3)(g) and (j) by clear and convincing evidence.

The trial court also concluded that termination was in the children's best interests. The trial court found that Woytaszek's failure to attend parenting visits was harmful to the children. It found that the children had been in foster care for a significant amount of their lives, and that the children did not deserve to be subjected to Woytaszek's ongoing inability to care for them.

## II. MCL 712A.19b(3)(g) AND (j)

### A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination.<sup>1</sup> The trial court's factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake.<sup>2</sup>

### B. LEGAL STANDARDS

MCL 712A.19b(3)(g) provides that the trial court may terminate a parent's rights if

[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

MCL 712A.19b(3)(j) provides that the trial court may terminate parental rights if

[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The trial court may properly consider the parent's mental health and substance abuse conditions when determining whether it is reasonably likely that the child will be harmed if returned to the parent's home.<sup>3</sup> The trial court may consider the potential psychological harm to the child caused by the parent's conduct or capacity.<sup>4</sup>

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<sup>1</sup> MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

<sup>2</sup> *In re Mason*, 486 Mich at 152.

<sup>3</sup> See *In re AH*, 245 Mich App 77, 87; 627 NW2d 33 (2001).

<sup>4</sup> *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

### C. APPLYING THE STANDARDS

Woytaszek contends that the trial court erred by finding that clear and convincing evidence supported terminating his parental rights under MCL 712A.19b(3)(g) and (j) because the trial court improperly relied on his past criminality and incarceration. We disagree.

The trial court may not terminate a parent's parental rights solely on the basis of parental incarceration.<sup>5</sup> The trial court must offer incarcerated parents the opportunity to participate in proceedings involving their children.<sup>6</sup>

Here, the trial court terminated Woytaszek's parental rights on the basis of his history of incarceration, as well as his history of transiency, noncompliance with authority, and failure to comply with his treatment plan. Contrary to Woytaszek's assertions, the trial court did not terminate Woytaszek's parental rights *solely* on the basis of his incarceration. Further, the trial court offered Woytaszek the opportunity to participate in services between his incarcerations. Woytaszek not only failed to participate but, in many instances, actively avoided participation by cancelling appointments, fleeing drug screens, and leaving residential treatment early.

Although Woytaszek's mother offered to assist Woytaszek with the children, the children were not placed with Woytaszek's mother while he was incarcerated. Woytaszek's mother was unable to provide a home for the children during the pendency of this case, and the children were placed in foster care. Notably, Woytaszek's mother offered to help Woytaszek with the children until he was reestablished. She did not express that she would be able to care for the children in his absence. Also, though Woytaszek testified that he planned to live with his mother when released from jail, he had failed to do so twice before.

Given Woytaszek's history of frequent incarcerations, it was probable that Woytaszek would leave the children without proper care and custody. Additionally, the trial court found that Woytaszek's frequent absences were likely to psychologically harm the children.

We conclude that the trial court did not terminate Woytaszek's parental rights solely on the basis of his incarceration and history of incarceration.

Woytaszek also contends that the trial court erred because the trial court may not terminate a parent's parental rights solely for failing to comply with his or her service plan. We disagree.

A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and custody.<sup>7</sup> A parent's failure to comply with the terms and conditions of his or her service plan is also evidence that the child

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<sup>5</sup> *In re Mason*, 486 Mich at 152.

<sup>6</sup> *Id.* at 154.

<sup>7</sup> *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

will be harmed if returned to the parent's home.<sup>8</sup> Thus, Woytaszek is not correct that the trial court may not terminate a parent's parental rights for failure to comply with a service plan. If the parent's failure to comply with his or her service plan provides clear and convincing evidence of a ground for termination, the trial court may rely on the parent's failure to comply with his or her service plan to support terminating his or her parental rights.

Here, Woytaszek's service plan was designed to address Woytaszek's substance abuse, which strongly contributed to his frequent incarcerations. As discussed above, the Department proved that Woytaszek was unable to provide his children with proper care and custody while incarcerated. Thus, the trial court did not err when it determined that Woytaszek's failure to comply with his service plan supported terminating his parental rights.

We are not definitely and firmly convinced that the trial court erred by terminating Woytaszek's parental rights under MCL 712A.19b(3)(g) and (j).

### III. THE CHILDREN'S BEST INTERESTS

#### A. STANDARD OF REVIEW

If the Department has established a statutory ground for termination by clear and convincing evidence, the trial court must order a parent's rights terminated if it finds from a preponderance of evidence on the whole record that termination is in the children's best interests.<sup>9</sup> We review for clear error the trial court's best-interests determination.<sup>10</sup>

#### B. LEGAL STANDARDS

To determine whether termination of a parent's parental rights is in a child's best interests, the court should consider a wide variety of factors that may include "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home."<sup>11</sup> The trial court may also consider the parent's visitation history and compliance with court-ordered plans, the children's well-being while in care, and the possibility of adoption.<sup>12</sup>

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<sup>8</sup> MCL 712A.19a(5); *In re Trejo Minors*, 462 Mich 341, 362-363; 612 NW2d 407 (2000); *In re Rood*, 483 Mich 73, 100; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.).

<sup>9</sup> MCL 712A.19b(5); *In re Olive/Metts Minors*, 297 Mich App at 40; *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013).

<sup>10</sup> MCR 3.977(K); *In re Trejo Minors*, 462 Mich at 355-356.

<sup>11</sup> *In re Olive/Metts Minors*, 297 Mich App at 41-42 (internal citations omitted).

<sup>12</sup> See *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re AH*, 245 Mich App at 89.

### C. APPLYING THE STANDARDS

Woytaszek contends that the trial court erred when it found that termination of his parental rights was in the children's best interests because the children loved him and he was a loving father.

We do not disagree with Woytaszek's contention that the evidence in this case showed that Woytaszek loved the children, the children loved him, and he was a good parent when he was able to care for his children's needs. However, the trial court should weigh all the evidence available to determine the children's best interests.<sup>13</sup>

Here, the trial court appropriately considered the children's need for a consistent parent and how long the children had been in foster care without a stable home. The trial court also considered Woytaszek's failure to comply with his service plan and his inconsistent attendance at parenting times, which harmed the children. Given the evidence in the record, we are not definitely and firmly convinced that the trial court made a mistake.

### IV. CONCLUSION

We conclude that the trial court did not terminate Woytaszek's parental rights solely on the basis of his incarceration, and it properly considered Woytaszek's failure to comply with his service plan. We conclude that the trial court did not err when it found that terminating Woytaszek's parental rights was in their best interests.

We affirm.

/s/ Amy Ronayne Krause

/s/ E. Thomas Fitzgerald

/s/ William C. Whitbeck

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<sup>13</sup> *In re Trejo Minors*, 462 Mich at 356-357.